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Paper No. 12

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**SPECIAL PROGRAMS OFFICE
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In re Application of
LISA WATKINS
Application No. 08/722,345
Filed: September 29, 1996
FOR: PORTABLE/HANGING FEMININE
SANITARY NAPKIN BAG

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ON PETITION

This is a decision on the communication filed November 5, 1998, to a petition to revive this application as unavoidably abandoned.

The petition is *dismissed*.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)."

A grantable petition to accept late payment of the issue fee under 37 CFR 1.137(a) must be accompanied by (1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continued application. (2) the petition fee required by 37 CFR 1.17(1); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) a terminal disclaimer and fee (as set forth in 37 CFR 1.20(d) required pursuant to paragraph (c) above). This petition lacks item (3).

This application became abandoned for failure to respond in a timely manner to the non-final Office action of July 24, 1997, which set a shortened statutory period for response of three (3) months. Informal responses were filed on October 16, 1997, October 23, 1997 and November 21, 1997. Petitioner was notified

of the informalities in these responses via the Office communications of November 3, 1997 and December 22, 1997, and was advised that to properly respond to the non-final action petitioner must obtain extensions of time under 37 CFR 1.136(a) and provide a complete response under 37 CFR 1.111. A fee schedule was also provided. No proper response to the Office action of July 24, 1997 was filed and no extensions of time under the provisions of 37 CFR 1.136(a) were obtained. Accordingly, this application became abandoned on October 24, 1997. A Notice of Abandonment was mailed on April 29, 1998.

Petitioner attributes the delay in submitting a proper response to the Office action in a timely manner to: (1) petitioner's husband death due to gunshot wound, (2) petitioner's incapacitation due to her financial difficulties, and (3) petitioner's ill-health.

The showing of record is inadequate to establish unavoidable delay within the meaning of 35 U.S.C. section 133 and 37 CFR 1.137(a).

As noted *supra* in item (3), a grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable. The time frame for such a showing under 37 CFR 1.137(a) to show unavoidable delay would be from October 24, 1997 to November 5, 1998.

There are three periods to be considered during the evaluation of a petition under 37 CFR 1.137(a):

- (1) The delay in reply that originally resulted in abandonment;
- (2) The delay in filing an initial petition pursuant to § 1.137(a) to revive the application; and
- (3) the delay in filing a *grantable* petition pursuant to § 1.137(a) to revive the application. *See Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. 53131 at 53158 (October 10, 1997).*

With respect to the first period, petitioner's financial difficulties during this time frame has no bearing on her not responding to the non-final office action because petitioner had three months to reply to the office action mailed July 24, 1997,

i.e. until October 24, 1997, with no fees due. Petitioner's lack of diligence does not constitute unavoidable delay. Furthermore, petitioner's husband succumbed to the gunshot on June 13, 1997 which is not within the relevant time frame to show unavoidable delay during this period. Even assuming that the death of her husband caused the petitioner emotional distress into the period encompassed by the relevant time frame, petitioner should have provided documentation supporting these averments, such as a statement from petitioner's physician attesting to her emotional state and condition, and statements and receipts such as from health care individuals which could document petitioner's state of mind at the time the response came due. An adequate showing in response to these requirements requires a statement by all persons with direct knowledge of the cause of the delay, setting forth the facts as they know them, and a showing of all bills paid, treatment received, etc., which made the delay in responding to the non-final action. Petitioner has not carried her burden of proof to establish to the satisfaction of the Commissioner that the delay was unavoidable during the first period.

With respect to the second period, petitioner points to unfortunate circumstances of other family members, in September 30, 1998 and being terminated from Public Assistance on October 14, 1998. However, such clearly does not explain the entire delay from October 24, 1997 through November 11, 1998, much less demonstrate that the entire delay was unavoidable. Should petitioner continue to contend that financial difficulty caused or contributed to the delay, then petitioner should provide a verified showing of the petitioner's financial condition at the time, including income, expenses, assets, credit and obligations, which made the delay in prosecution unavoidable. Petitioner should provide copies of any documents or records that would confirm the financial difficulty. In this regard, petitioner would have to show that her financial condition from October 24, 1997 until the filing of the petition on November 5, 1998, was continuously such so as to have precluded petitioner's taking any earlier action(s) with regard to furthering the prosecution of this application. In this regard, as the petition fee is only \$55, petitioner would have to demonstrate that she was financially unable to afford the petition fee.

While the showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a) and assuming that petitioner cannot make the requisite showing of unavoidable delay, petitioner may wish to consider filing a petition under amended 37 CFR 1.137(b). Section 1.137(b) now provides that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). a grantable petition pursuant to 37 CFR 1.1379(b) must be accompanied by:

(1) The required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof;

(2) The petition fee as set forth in § 1.17(m) (\$605);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) Any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to 37 CFR 1.137(c).

A suitable form for filing a petition under 37 CFR 1.137(b) is enclosed.

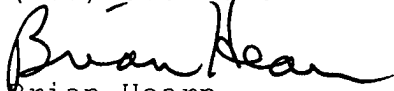
Further correspondence with respect to this matter should be addressed as follows:

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Telephone inquiries concerning this matter may be directed to C. Sayala at (703) 306-5594, or in her absence, the undersigned at (703) 305-1820.



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